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No. 92

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, *Appellant*

v.

CHARLES T. HVASS

On Appeal from the United States District Court for the Northern District of Iowa Central Division

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum decision of the District Court (R. 5-10) is not reported.

JURISDICTION

On December 27, 1956, the United States District Court for the Northern District of Iowa entered an order (R. 11) dismissing an indictment for perjury on the ground that sworn testimony given in a pro-

ceeding conducted under a local rule of court to determine an attorney's fitness to practice before the court was not testimony in a "case in which the law of the United States authorizes an oath to be administered" within the meaning of the federal perjury statute (18 U.S.C. 1621). A notice of appeal to this Court was filed in the district court on January 24, 1957 (R. 14). On April 23, 1957, appellee moved to affirm the judgment below. On June 3, 1957, this Court ordered (R. 15) that "further consideration of the question of jurisdiction [be] postponed to the hearing of the case on the merits." The jurisdiction of this Court to review on direct appeal an order dismissing an indictment, based on a construction of the statute upon which the indictment rests, is conferred by 18 U.S.C. 3731.

STATUTE AND RULE INVOLVED

18 U.S.C. 1621 provides in pertinent part:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury * * *.

Local Rule 3 of the United States District Courts for the Northern and Southern Districts of Iowa provides:

> All attorneys residing outside of the State of Iowa and having civil matters in the court shall associate with them a resident attorney on whom notice may be served and who shall have the au-

thority to act for and on behalf of the client in all matters, including pre-trial conferences and the trial of the case. Such resident attorney shall be a member of the bar of the District, shall sign the first pleading filed and continue in the matter unless other qualified resident counsel be substituted. Non-resident attorneys who have so associated with them a resident attorney shall be permitted to participate in a particular case upon satisfactory showing of good moral character.

Provided further that where the action is one to recover damages for personal injuries sustained in Iowa by one who at the time was a resident of Iowa or the action is one to recover damages for the death of a resident of Iowa resulting from personal injuries sustained in Iowa, the Court may on its own motion, or on motion of a member of the bar of either District, before permitting a nonresident attorney to participate in the case, require a satisfactory showing that the connection of the said attorney, or the firm or attorney with which he is associated, was not occasioned or brought about in violation of the standards of conduct specified in Rule 8 hereof. The Court as a part of said showing may require the plaintiff and the said attorney to appear and be examined under oath.

QUESTION PRESENTED

Whether a willfully false statement of a material fact, made by an attorney under oath during a district court's examination into his fitness to practice before it, constitutes perjury within the meaning of 18 U.S.C. 1621.

STATEMENT

Local Rule 3 of the United States District Courts for the Northern and Southern Districts of Iowa provides a method by which the court may require a satisfactory showing of acceptable standards of conduct by non-resident attorneys before permitting them to appear in Iowa district court cases involving claims for personal injuries or unlawful death sustained in Iowa by residents of Iowa. The rule provides that, as a part of such showing, the plaintiff and the non-resident attorney may be required to appear and be examined under oath.

Pursuant to this rule, the United States District Court for the Northern District of Iowa entered an order requiring the non-resident attorneys interested in two Iowa negligence cases to appear and be examined under oath if they wished to participate in those cases (R. 7). Appellee Hvass, a non-resident attorney from Minneapolis, Minnesota, appeared and was examined under oath by the United States Attorney. Three hearings were held and at their conclusion the court entered an order stating that Hvass had not made a satisfactory showing under Local Rule 3. The judge accordingly denied Hvass' application to participate in the two cases and struck the appearance of his law firm as attorneys for the plaintiff in each case (R. 7).

On March 20, 1956, a four-count indictment was returned in the same district court, charging Hvass with violation of the federal perjury statute, 18 U.S.C. 1621, *supra*, p. 2. Each count charged him with giving false testimony under oath at the admission hearing in response to questions bearing on champerty and maintenance (R. 1-4). The district court, speaking through

a judge from a different district sitting by designation (R. 12), sustained a motion to dismiss the indictment. The memorandum decision below holds that the rule under which Hvass took his oath "is not such a law of the United States as was intended by Congress to support an indictment for perjury". The court recognized "that generally speaking a rule of court has the force of law", and agreed that "[w]ithout question a United States District Court has the right to determine the fitness of attorneys who may practice in such court". It reasoned, however, that the proceeding was administrative in nature; that, once an attorney's fitness had been determined, the purpose of Rule 3 had been served; and consequently that testimony adduced at the hearing could not later be used to support an indictment for perjury. "In seeking to do so," the District Judge stated, "it appears to me that the United States is going far beyond what Congress intended in granting the rule-making power to the courts" (R. 7, 9-10).

SUMMARY OF ARGUMENT

A condition of liability under the federal perjury statute is that the false testimony be given in a case "in which a law of the United States authorizes an oath to be administered" (18 U.S.C. 1621). In this case, the court below held that a local rule of court, although it in terms authorized the examination under oath which gave rise to the charge of perjury, did not have sufficient force of law to bring the perjury statute into play. On that basis, it dismissed the indictment. The judgment of dismissal, since it rests on a determination as to the reach of the perjury statute upon which the indictment is founded, is appealable to this Court under the Criminal Appeals Act, 18 U.S.C. 3731.

A. There is no question that the proceeding in which the alleged false testimony was given was an authorized one in the sense that it was within the judicial power. The federal courts may determine and apply appropriate qualifications for admission to practice. Moreover, there is no challenge to the fairness of the procedures which were followed.

B. Apart from the local rule of court, authority to administer an oath in the conduct of an admission proceeding may be derived from the statute generally authorizing judges to administer oaths (28 U.S.C. 459). The failure of this statute to specify individually the various types of proceedings in which oaths may be administered cannot justify an inference that judges may administer oaths in the conduct of ordinary trials but not in other proceedings which fall within the court's jurisdiction. As the cases show, the inherent power of judges to administer oaths, long recognized at common law and confirmed by the federal statute, extends to all matters and proceedings within the tribunal's competence.

C. In addition, the local rule of court, which specifically authorized the administration of the oath, has the force of a law of the United States, for it represents a valid exercise of the rule-making authority conferred on the district courts by Congress. A "law of the United States" includes a rule or regulation promulgated by lawful authority. The quoted phrase has no extraordinary or specially restrictive meaning as used in the perjury statute. As this Court has stated, the perjury laws apply where the administration of an oath is authorized "either expressly by an act of Congress or by an authorized regulation." *United States* v. *Smull*, 236 U.S. 405, 409.

ARGUMENT

INTRODUCTION

This Court has determined that the essential elements of the crime of perjury, as defined in 18 U.S.C. 1621 (*supra*, p. 2), are "(1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement wilfully made as to facts material to the hearing". *United States* v. *Debrow*, 346 U.S. 374, 376. We are here concerned with the first requirement. The holding of the court below was that a local rule regulating the participation of non-resident attorneys and authorizing their preliminary examination under oath (*supra*, pp. 2-3) did not have sufficient force of law to bring the federal perjury statute (18 U.S.C. 1621, *supra*, p. 2) into play. On that basis, it dismissed the indictment.[1]

Before turning to the merits, we note our reasons for believing that this Court plainly has jurisdiction under the Criminal Appeals Act, 18 U.S.C. 3731. The decision below determined the reach of the perjury statute upon which the indictment was founded. It determined, otherwise stated, that the words "a law of the United States", as used in 18 U.S.C. 1621, do not embrace a rule of court of the type here involved. There is in this case no claim or suggestion that the indictment is defective as a pleading. The only issue is the correct interpretation of the perjury statute.

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[1] The precise words of the District Judge are as follows (R. 10): "I simply hold that Rule 3, under which the defendant took his oath, is not such a law of the United States as was intended by Congress to support an indictment for perjury."

Indeed, appellee concedes this Court's jurisdiction in his motion to affirm, in which he states (p. 5):

> It is recognized, of course, that a decision that a particular administrative regulation is or is not a "law of the United States" within the meaning of the perjury statute is, technically, a construction of the statute, and gives jurisdiction to this Court under the Criminal Appeals Act.

As this Court has definitively stated, when "the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute," and the case is one for direct appeal to this Court. *United States* v. *Borden Co.*, 308 U.S. 188, 193.

THE OATH ADMINISTERED TO APPELLEE WAS AUTHORIZED BY A LAW OF THE UNITED STATES WITHIN THE MEANING OF THE FEDERAL PERJURY STATUTE

A. It is within the power of a district court to determine the fitness of an attorney to practice before it.

The first step in showing that the district court had power to administer a binding oath to appellee is to establish that the proceeding in which the alleged false swearing took place was an authorized one. However, the proposition that it is within the power of a district court to determine the fitness of attorneys to practice before it is scarcely open to doubt (the court below agreed that the existence of such power was "without question," R. 7) and may be treated summarily. As this Court has unequivocally declared, *Ex parte Garland*, 4 Wall. 333, 378-379, a proceeding to determine whether one shall be admitted to practice before a fed-

eral court "is the exercise of judicial power, and has been so held in numerous cases."[2] See, also, *Randall* v. *Brigham*, 7 Wall. 523, 535; *Ex parte Secombe*, 19 How. 9, 15. Compare cases involving review by this Court of admission proceedings in the States, *e. g.*, *In re Summers*, 325 U.S. 561; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, *Konigsberg* v. *State Bar of California*, 353 U.S. 252.[3]

Moreover, there is no challenge to the procedures which were followed. Initially, the district court entered an order (see R. 7) fixing a date for appellee to appear and be examined under oath pursuant to the

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[2] The opinion in *Garland* also declares (*ibid.*) that the conduct of such proceedings "is not the exercise of a mere ministerial power." We do not read the statement of the court below that the alleged false statements were made in an "administrative proceeding" (R. 7) as necessarily holding to the contrary. But if that is the intended meaning, the statement is erroneous It is true, to be sure, that the matter of admitting attorneys to practice involves considerations which touch closely upon the administration of the business of the courts. It is no less true that such proceedings involve conventional fact-finding and the determination of rights and privileges. In all events, we believe it immaterial that the proceeding may be deemed to have administrative aspects. The question is simply whether the proceeding, however denominated, is one which the court had power to conduct and one in which a law of the United States authorized an oath to be administered.

[3] In the *Summers* case, in which the state courts characterized the admission proceeding as administrative, this Court held (325 U.S. at 568-569):

> A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made by judicial order, it is a case which may be reviewed under Article III of the Constitution when federal questions and proper steps taken to that end, in this Court.

local rule of court (quoted *supra*, pp. 2-3). Three hearings were subsequently held, with full opportunity for examination and cross-examination of witnesses, and the court then entered an order finding that appellee had not made a satisfactory showing under the rule so as to warrant admission (R. 7). It was appellee's testimony at one of these hearings which gave rise to the indictment for perjury.

B. Apart from the local rule of court, federal law authorizes administration of a binding oath in an admission proceeding.

Congress has not attempted to specify individually the numerous types of proceedings in which a federal judge may administer a binding oath, Instead, it has broadly provided (28 U.S.C. 459) that "[e]ach justice or judge of the United States may administer oaths and affirmations and take acknowledgments." We do not suggest that this provision empowers a judge to administer an oath for any purpose which he may conceive, however unrelated that purpose may be to the conduct of the business of the judiciary. The authorization to administer oaths must certainly be taken to carry with it the implied limitation that the proceeding in which the party is put under oath be one which it is within the power and competence of the court to conduct. But that, we submit, is the only limitation. There can be no justification for implying the limitation that a court may administer binding oaths in conducting a trial but that it may not do so in conducting other proceedings (*e. g.*, admission proceedings or various types of ancillary proceedings) no less within the competence of courts. In particular, there is no warrant for limiting a court's authority to require an oath to strictly "judicial" actions.

If precise specification of each type of proceeding in which an oath may be administered were a prerequisite to application of the penalties for perjury, the result would be a virtual nullification of the perjury statute, for neither statute nor federal rule provides in terms that an oath shall be administered to a witness who testifies at an ordinary district court trial.[4] The failure of Congress to detail the specific types of proceedings in which a judge may administer an oath simply reflects a familiar fact of our history:—that, in Anglo-American law, judges, from time immemorial, have had the inherent power to administer oaths in the conduct of proceedings which fall within their jurisdiction.[5] The provision in 28 U.S.C. 459, gen-

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[4] Note that the Federal Rules of Civil Procedure, although they make no provision for administration of an oath to a witness before the court, specifically confer upon masters power to put witnesses under oath. Rule 53(c). See 70 *Corpus Juris* 482, note 30(h), for state cases discussing a court's inherent power to administer an oath to a witness.

[5] The history of the requirement that a witness must take an oath in order to give testimony goes back to early civilizations and has a long history at common law. Wigmore on *Evidence*, 3d ed., Sec. 1815. "The oath used to be regarded as a summoning of Divine vengeance upon false swearing, whereby when the spectators see the witness standing unharmed they know that the Divine judgment has pronounced him to be a truth-teller. But it is now conceived as a method of reminding the witness strongly of the Divine punishment somewhere in store for false swearing, and thus of putting him in a frame of mind calculated to speak only the truth as he saw it." *Id.*, Sec. 1816. For centuries, Anglo-American law has remained faithful to the precept that " for *all testimonial statements* made in court the oath is a requisite" (*id.*, Sec. 1824), the only qualification being that it is now generally permitted, both in English and American jurisdictions, to substitute a solemn affirmation for an oath. *Id.*, Sec. 1828; Federal Rules of Civil Procedure, Rule 43(d).

erally authorizing judges to administer oaths, is merely declaratory of the common law. Indeed, that section of the Code aside, there would be a "law of the United States" permitting the federal courts to put a witness under oath:—the common law, together with such provisions of constitutional and statutory law as confer the judicial power upon the particular tribunal.

The decisions fully confirm the view that the power to administer oaths is an inherent attribute of the judicial power and that it extends to all proceedings within the tribunal's competence, whether they be characterized as "judicial" or "administrative." *Glickstein* v. *United States*, 222 U.S. 139, involved an indictment for perjury committed before a referee in bankruptcy, an officer authorized by statute to conduct an examination, but not specifically authorized to administer an oath. This Court held that the authority to put a witness under oath and the liability of the witness to punishment for false swearing are inherently a part "of the power to compel the giving of testimony" (p. 141). The Court found it inconceivable that there could be authority in a judicial officer to conduct an examination "where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful" (p. 142). See, also, *Goodman* v. *United States*, 108 F. 2d 516, 520 (C. A. 9), holding that a district judge had discretionary authority to impose an oath of secrecy upon a grand jury witness and to punish a refusal to take the oath as a contempt, even though no federal statute specifically authorized administration of such an oath; *United States* v. *Ambrose*, 2 Fed. 566 (C. Ct., S. D. Ohio), holding that perjury would lie against a clerk

of court who falsely swore to his accounts, since a judge has power to administer oaths in matters arising in his court or coming before him as a judicial officer.[6] Cf. *United States* v. *Morehead*, 243 U.S. 607; and see also the cases cited *infra*, pp. 14-15.

By the same token, once the oath has been properly administered, a false swearing lays the basis for invoking the federal perjury statute even though the tribunal administering the oath does not desire the criminal penalty to ensue. It is *Congress* which has determined that perjury before a competent tribunal, once the oath has been properly administered, shall be punished. The tribunal cannot make an exception to that general rule which Congress has established.

C. The applicable rule of court, which in terms authorizes examination of attorneys under oath, has the force of a law of the United States.

Congress has delegated broad rule-making authority to the district courts. 28 U.S.C. 2071 provides: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court". There can be no question that such rule-making authority comprehends the establishment of rules for admission of attorneys to practice. Thus 28 U.S.C. 1654 provides: "In all courts of the United States the parties may plead and conduct their own cases personally or

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[6] Other questions arising under the indictment were certified to this Court and the validity of the indictment sustained, *United States* v. *Ambrose*, 108 U.S. 336.

by counsel as, *by the rules of such courts, respectively,* are permitted to manage and conduct causes therein" (emphasis added). See, also, Federal Rules of Civil Procedure, Rule 83. The rule of court here in question explicitly provides that, under the conditions specified, the court may require the "attorney to appear and be examined under oath."

The term "federal law" (or "law of the United States") can, of course, embrace any rule or regulation promulgated by lawful authority, and normally does so. *United States* v. *Howard,* 352 U.S. 212; *Lilly* v. *Grand Trunk R. Co.,* 317 U.S. 481, 488; *Atchison, Topeka and Santa Fe Ry.* v. *Scarlett,* 300 U.S. 471, 474; *Roumanian American Winery, Inc.* v. *Morgenthau,* 152 F. 2d 452, 45 (C. A. 2). Certainly, there is no basis for suggesting that the phrase "law of the United States" is used in an extraordinary or specially restrictive sense in the perjury statute. The decisions of this Court make it abundantly clear that, for purposes of prosecution for false swearing or perjury, the authority for administering an oath may be found either in a statute of the United States or in a rule or regulation promulgated pursuant to a valid delegation of rule-making authority.

United States v. *Smull,* 236 U.S. 405, involved a prosecution for perjury arising out of a false affidavit submitted by a homestead applicant in filing papers called for by regulations of the General Land Office. "It cannot be doubted", this Court stated in sustaining the indictment (pp. 408-409), "that a charge of perjury may be based upon Section 125 of the Criminal Code [the federal perjury statute] where the affidavit is required either expressly by an act of Congress or by

an authorized regulation of the General Land Office * * *."[7]

In *Caha* v. *United States*, 152 U.S. 211, it was charged that perjury was committed in a contest before a land officer in respect to the validity of a homestead entry. It was contended that, since there was no statutory authorization for such a contest, the oath was not taken in a "case in which a law of the United States authorizes an oath to be administered". This Court pointed out that there was a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of the public land and that, pursuant to this authority, the Department had adopted a regulation providing for a hearing before local land officers in cases of disputed homestead entries. On this and other grounds, it concluded (p. 218): "Clearly, then, within the scope of Section 5392 [the federal perjury statute] the local land officers in hearing and deciding upon a contest with respect to a homestead entry constituted a competent tribunal, and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered." See, also, *United States* v. *Bailey*, 9 Pet. 238.[8]

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[7] As the *Smull* case illustrates, perjury may occur in the course of *ex parte* proceedings or investigations, as well as in ordinary lawsuits. See, also, *Woolley* v. *United States*, 97 F. 2d 258, 261 (C. A. 9), certiorari denied, 305 U.S. 614, involving a charge of perjury arising out of an *ex parte* investigation by the Securities and Exchange Commission, and cases there cited.

[8] Obviously, there can be no basis for suggesting that administrative agencies may adopt rules requiring the administration of an oath but that courts may not promulgate such rules, particularly in light of the fact that courts have always had the inherent power to administer oaths in the conduct of their business (see

In sum, we submit that the rule of court here involved was a valid regulation appropriate to the exercise of the judicial power and within the rule-making authority of district courts; that the rule in terms authorized the taking of testimony under oath; and that it follows perforce that false testimony given in a proceeding conducted under the rule constitutes the offense of perjury.[9]

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supra, pp. 11-13). The cases cited in the text also emphasize that appellee's position is not aided by the suggestion that the proceeding in which he appeared served an "administrative" purpose (see note 2, p. 9, *supra*).

[9] The opinion below states (R. 10) that the "purpose of the rule was accomplished when Hvass was denied the right to participate" in the cases in which he sought to appear as counsel. But the indictment rests upon the perjury statute, and seeks to enforce the purposes of that statute. The rule is relevant, to be sure, in determining whether the proceeding in which the alleged false testimony was given was a proceeding in which the administration of an oath was authorized. But assuming that to be so (as we believe we have shown), it is the perjury statute which establishes and delineates the offense charged. It is that statute which, for reasons of public policy requiring no elaboration, imposes a sanction for false swearing. Ordinarily, a proceeding in which false testimony was given will have terminated before an indictment based on such testimony is returned. But neither the termination of the original proceeding nor the failure of the perjurious testimony to accomplish its object can constitute a defense to the criminal charge. Even unsuccessful perjury is prohibited and is to be prevented.

CONCLUSION

The judgment below should be reversed and the cause remanded for trial.

Respectfully submitted,

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